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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-185

LODGE 76, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO and DISTRICT NO. 10, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Petitioners,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION
and
KEARNEY & TRECKER CORPORATION,
Respondents.

On Writ of Certiorari to the Supreme Court of Wisconsin

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Supreme Court of Wisconsin is reported at 67 Wis. 2d 13, 226 N.W. 2d 203, and reprinted in the petition for writ of certiorari here (p. A-2ff).[1] The opinion of the

[1] References to pages of the appendix of the petition will be indicated "P. A-". Pages in the single appendix will be referenced "A".

Circuit Court for Milwaukee County and the decision of the Wisconsin Employment Relations Commission are unreported but are printed here at P. A-15ff and P. A-22ff, respectively.

JURISDICTION

The judgment of the Supreme Court of Wisconsin was entered on March 4, 1975. A timely petition for rehearing was denied on May 6, 1975 (p. A-1 of the petition for writ of certiorari), and within 90 days the petition for writ of certiorari was filed on August 2, 1975. It is timely. Cf. *Department of Banking v. Pink*, 317 U.S. 264, 266 (1942). *United States v. Healy*, 376 U.S. 75, 78 (1964).

QUESTION PRESENTED

Does a State offend Article VI of the Constitution of the United States if it applies local standards respecting allowable collective bargaining weapons to outlaw peaceful concerted refusals to work voluntary overtime for an employer in interstate commerce, a self-help action permitted under the balance of power between labor and management expressed in national labor policy?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Constitution of the United States, of the National Labor Relations Act and of the Wisconsin Statutes are set out in Appendix A (*infra*, p. 33).

STATEMENT

On June 15, 1972 Kearney & Trecker Corporation (K & T or Employer) commenced this action before the Wisconsin Employment Relations Commission (Commission) to restrain Lodge 76, International Association of Machinists and Aerospace Workers, AFL-CIO (Lodge 76 or Union) and District No. 10, International Association of Machinists and Aerospace Workers, AFL-CIO (District 10) from authorizing concerted refusals by K & T employees to work overtime (A. 3ff).[2] The Commission sustained the complaint, holding that Lodge 76 had committed an unfair labor practice under state law and entering a cease and desist order in the usual form. Ultimately, the Commission's order was upheld by the Supreme Court of Wisconsin.

K & T manufactures machine tools at its several Milwaukee area plants and engages in interstate commerce, meeting the jurisdictional standards set by the National Labor Relations Board (P. A-25; A. 47). Lodge 76 represents all of its hourly employees for purposes of collective bargaining, over 600 in number, and was party to a labor agreement signed in 1969 that, following notice from the Employer, terminated on June 19, 1971 (P. A-25—A-26; A. 21). Under that agreement, and for the past 17 years the basic work day was seven and one-half hours, Monday through Friday, for a basic work week of 37 and one-half hours. Hours worked in excess of the basic work day or basic work week were compensated at overtime rates (P. A-26). Acceptance of overtime work has always been optional, with the employee free to reject the offer (P. A-32; A. 22, 24, 39).

Negotiations for a successor agreement commenced in October 1970 and were not concluded until July 23, 1972, when

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[2] Collectively, Lodge 76 and District 10 will be termed the Unions.

the new contract took effect (P. A-26). In the bargaining K & T insisted that the basic work day and basic work week be lengthened to eight hours per day, Monday through Friday, and 40 hours per week, with the terms on which overtime would be payable restricted accordingly (P. A-27). Lodge 76 consistently rejected this demand, and by June 22, 1971, the parties had reached impasse on this and several other Employer proposals. On that date, K & T brought additional economic pressure to bear on the Union by making various unilateral changes in established working conditions (P. A-41). It stopped the check-off of Union dues, eliminated the Union's office in the plant, ceased paying employees for Union lost time, and, over the Union's objection, implemented the changes in overtime allocation, wages and seniority it had proposed (P. A-27, P. A-41; A. 18, 34-35, 66ff).

On March 1, 1972, although the parties remained at impasse, the Employer announced its decision to implement unilaterally, as of March 13, the changes in basic work day, basic work week and overtime pay it was demanding (P. A-27). In response, at a meeting on March 7,[3] the membership of Lodge 76 authorized its officers to request strike sanction and unanimously passed resolutions that no member should work overtime, defined as over seven and one-half hours per day and 37 and one-half hours per week (P. A-31; A.39). At bargaining sessions on March 10 and 11, K & T made two proposals, the effect of which was to defer implementation of the changes in work day, work week and overtime pay if the Union would agree that the employees could be compelled to work daily (but not weekend) overtime (P. A-31; A. 23-24, 60-62).

From March 7, 1972 until the new contract was settled on July 23, all but a few Union employees refused to accept the

[3] The Employer acquiesced in the holding of this meeting during working hours without much prior notice, and expressly repudiated any contention that this formed part of its § 111.06(2) (h) complaint against the Unions (A. 36-37).

overtime work proffered but continued to work the seven and one-half hour day and the 37 and one-half hour week (P. A-32-P. A-33; A.39). There was no strike or lockout. Despite its earlier announcement to the contrary, K & T chose not to implement its eight hour day and 40 hour week demands on March 13 or at any time thereafter. (P. A-39). Because acceptance of overtime work continued to be optional, the Employer did not impose any discipline on employees who refused to work the overtime scheduled during this period.[4]

Instead, over three months later, K & T turned to legal action to end the concerted activity. On June 12, 1972 it filed an unfair labor practice charge with Region 30 of the National Labor Relations Board and at the same time, commenced this proceeding before the Commission. On June 27, the Board's Regional Director dismissed the charge that the Union's overtime ban violated § 8(b)(3) of the National Labor Relations Act (NLRA or Act), 29 U.S.C. § 158(b)(3), on the ground that such conduct was not prohibited by the federal statute.[5] No appeal was taken from this ruling. (P.A-40, A. 30). However, its complaint that the activity was an unfair labor practice under the state law, § 111.06 (2)(h), Wis. Stats., was sustained by the Commission and by the Supreme Court of Wisconsin. From the outset and at all subsequent stages of the litigation, the Unions preserved in timely and proper fashion the question of federal preemption presented here.

[4] "Q. Does the Company continue to schedule overtime? A. Yes.

Q. And has the Company taken any disciplinary action where there has been an individual's refusal? A. No, it has not.

Q. And this has continued for the months of March, April, May, June and into July? A. The reason it has not is because the acceptance of overtime is optional to the employes. Therefore, we would be hard pressed to discipline an individual employe for not accepting overtime." (A. 38-39).

[5] Citing *Labor Board v. Insurance Agents' International Union, AFL-CIO*, 361 U.S. 477 (1960).

The Commission concluded that state jurisdiction existed because the Union's conduct was "not an activity which is arguably protected under Section 7 or arguably prohibited under Section 8" of the Act and was therefore subject to restraint under state law on the authority of this Court's holding in *Briggs-Stratton*,[6] and its understanding of the *Garmon*[7] test. On appeal, the Supreme Court of Wisconsin sustained state jurisdiction upon determinations that the Union's conduct was neither arguably protected nor arguably prohibited by the Act, and that state prohibition of the activity was not "contrary to any legislative purpose" of the federal statute (P. A-14). *Briggs-Stratton*, the court reasoned, was "authority" for the rule that Congress left plenary jurisdiction to the states to regulate what were termed "strike tactics" (P. A-10). This Court's holding in *Morton*[8] that a state may not bar self-help weapons which are merely permitted but not "arguably protected" from employer reprisal by § 7 was distinguished because secondary pressures rather than "partial strikes" were involved. Regulation of partial strikes, the court below held, is "left wholly to the states" (P. A-14).

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[6] *International Union, UAW v. Wisconsin Employment Relations Board*, 336 U.S. 245 (1949), commonly known as *Briggs-Stratton*. The Commission concurred in the rationale that the "result" in *Briggs-Stratton* has survived this Court's repeated repudiation of its "approach". P. A.-46. It reached this conclusion reluctantly. The Commission found "persuasive" the argument that this "allow[ed] the states too great leeway to regulate the use of economic weapons by the parties thereby disturbing the relative balance of power established by the federal scheme" but felt compelled to reject the argument based on the test as phrased by this Court in *Garmon, infra*. (P. A-48)

[7] *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959).

[8] *Local 20, Teamsters Union v. Morton*, 377 U.S. 252 (1964).

SUMMARY OF ARGUMENT

The states may not outlaw peaceful concerted activities permitted by the comprehensive federal statute in order to enforce narrower local concepts as to allowable collective bargaining weapons. Peaceful economic pressure not prohibited by § 8 of the Act cannot be forbidden by the states if the delicate balance of collective bargaining power between labor and management struck by Congress is to be preserved on a national basis as the legislature intended. Whatever may be the case as to the application of state trespass, libel and contract law to labor disputes, Congress did not enact the federal labor statute against the backdrop of state law as it related to the availability of peaceful worker weapons of self-help in the context of collective bargaining. Congress occupied this field when it established its own balance of economic forces, protecting some conduct from employer or union retaliation, prohibiting other pressures and leaving the rest to be controlled by the free play of economic self-help. Since the state law in question directly forbids the use of a federally permissible collective bargaining weapon and since, in any event, the asserted state interest comes down to a mere disagreement with the manner in which Congress accommodated the identical interests, the judgment below conflicts with the supremacy clause of the Constitution of the United States.

The will of Congress to occupy the field of permissible collective bargaining forces is demonstrated by its pervasive regulation of this crucial area, by uniformity interests that are implicit and explicit in its enactment, by the freedom of contract considerations that are at the core of its scheme, and by the nature of the legislative process that gave rise to the enactment of relevant provisions of this statute. In addition, since Congress deliberately rejected a proposal which quite likely would have outlawed the conduct in question here because it thought em-

ployer self-help sufficient in the circumstances, Wisconsin may not frustrate the federal determination to leave control over such concerted worker action to the free play of economic forces.

Only once, over 25 years ago, has this Court upheld the exertion of state power in this field. That decision is no longer authoritative and should be overruled or limited to its facts. Its essential premises have atrophied and been severely eroded by the clear pattern of later preemption decisions of this Court. Indeed, this Court has repudiated its approach on three occasions and openly questioned the viability of its substantive holding. Judicial effort to synthesize its aberrational holding with subsequent decisions have tended to obscure the ultimate foundations of the preemption doctrine and to yield a stated principle which has provoked conceptual difficulties more apparent than real.

In any event, since concerted exercise of a right to reject overtime is protected from employer interference by § 7 of the Act, black-letter preemption doctrine bars Wisconsin from restraining the exercise of the federal right. The National Labor Relations Board holds that § 7 protects concerted refusals to work voluntary overtime, i.e. where employees do not impose on their employer their own conditions of employment to perform the work. The court below patently misread the federal precedents in holding to the contrary.

ARGUMENT

I. The States May Not Outlaw Peaceful Concerted Activities Permitted by the Comprehensive National Labor Law by Enforcing Narrow Local Concepts as to Allowable Collective Bargaining Weapons.

A. An overview.

Only once, in the close to 30 years since the Taft-Hartley amendments were passed, has this Court upheld state limitation of peaceful employee economic pressure in support of lawful collective bargaining aims against an employer in commerce. The exception, *Briggs-Stratton*,[9] was decided by a bare majority in 1949, "at a time when the Court had not worked through the problems of accommodating state and federal labor laws."[10] Since then, on three occasions, this Court has repudiated its "approach" as affording inadequate protection for important federal interests,[11] and its substantive premises have been completely undermined and bypassed.[12] Judicial effort to synthesize its aberrational holding with subsequent decisions have tended to obscure the ultimate foundations of the doctrine and to yield a stated principle which, while possibly "capable of

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[9] *International Union, UAW v. Wisconsin Employment Relations Board*, 336 U.S. 245 (1949).

[10] Cox, "Labor Law Preemption Revisited", 85 *Harv. L. Rev.* 1337, 1346 (1972).

[11] *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245, n. 4 (1959). *Labor Board v. Insurance Agents International Union, AFL-CIO*, 361 U.S. 477, n. 23 (1960); *Amalgamated Ass'n. of Street, etc. Employees v. Lockridge*, 403 U.S. 274, 291 (1971).

[12] See pp. 23-27, *infra*.

relatively easy application,"[13] has also provoked conceptual difficulties more apparent than real.[14]

The inquiry as to whether employee conduct may be regulated by the states is not the same as the question of whether it is actually or arguably protected from employer reprisal by § 7 of the Act.[15] "This Court has held repeatedly that federal law preempts state remedies that interfere with federal labor policy *or* with specific provisions of the NLRA."[16] At its core, federal labor policy expresses an "economic balance between labor and management, carefully formulated and preserved by Congress, in the federal labor statutes"[17] that leaves much activity that is neither protected nor prohibited to be "controlled by the free play of economic forces."[18]

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[13] *Amalgamated Ass'n v. Lockridge*, 403 U.S. at 289-290.

[14] See, e.g., the concurrence by Mr. Justice White in *International Longshoremen's Ass'n v. Ariadne Shipping Co.*, 397 U.S. 195 (1970); his dissent in *Lockridge*, 403 U.S. at 309 ff; and Part II of his dissenting opinion in *Labor Board v. Nash-Finch Co.*, 404 U.S. 138, 154 (1971). These views seem rooted in the premise that § 7 sets the perimeters of the preemption doctrine and hence the presupposition that the states are free to impose further limits on peaceful employer or union weaponry beyond those set forth in § 8.

[15] Mr. Justice Harlan exposed the nerve of this difficulty in *Bhd. of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 382, n. 17 (1969): "In the context of labor relations law, this word ['protected'] is fraught with ambiguity. 'Protected conduct' may, for example, refer to employee conduct which the States may not prohibit, see, e.g. *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468 (1955), or to conduct against which the employer may not retaliate, cf. e.g., *NLRB v. Truck Drivers*, 353 U.S. 87, 96 (1957)."

[16] *Connell Constr. Co. v. Plumbers & Steamfitters Local No. 100*, — U.S. —, 44 L.Ed. 2d 418, 433 (1975), emphasis added.

[17] *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 124 (1974).

[18] *Labor Board v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971). The test formulated here indicated no room at all for state policing of peaceful economic weapons. "The federal regulatory scheme (1) protects some activities, though not violence, (2) prohibits some practices, and (3) leave others to be controlled by the free play of economic forces."

At the same time, a "primary factor" leading to the enactment of a comprehensive national labor law, together with the establishment of a centralized expert agency to administer it, and therefore a touchstone for interpreting the preemptive legislative intent, was the

> "perceived incapacity of common law courts and state legislatures, acting alone, to provide an informed and coherent basis for stabilizing labor relations conflict and for equitably and delicately structuring the balance of power among conflicting forces so as to further the common good."[19]

So the federal scheme is not neutral as to confidence in state law and tribunals to regulate with respect to areas of conduct implicating "policies central to federal labor law" such as the economic balance respecting employee organization or peaceful collective bargaining weapons.[20] This factor counsels a preemption rule that does not leave discernment and application of the fine points of federal labor policy to tribunals that Congress thought ill-equipped to make such judgments.

Whatever the fact may be as to state trespass laws of general application or as to traditional contract law doctrines applied to union-member relations, it simply cannot be said that Congress enacted and amended the NLRA against the "backdrop of state law" relating to allowable collective bargaining weapons or that economic self-help is of merely "peripheral concern" to federal labor policy.[21] On the contrary, the avail-

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[19] *Amalgamated Ass'n v. Lockridge*, 403 U.S. at 286: "The purpose of the Act", this Court said succinctly in *Nash-Finch*, "was to obtain 'uniform application' of its substantive rules and to avoid the diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies' " 404 U.S. at 144.

[20] *Connell Constr. Co. v. Plumbers, etc. Local No. 100*, — U.S. at —, 44 L.Ed. 2d at 434. Cf. Cox, "Labor Law Preemption Revisited", 85 *Harv. L. Rev.* 1339, 1352-1354.

[21] Cf. *Taggart v. Weinacker's*, 397 U.S. 223, 227-228 (1970) (concurring opinion) and *Lockridge*, 403 U.S. at 320, 324 (dissenting opinion). The "unmistakable focus of both the NLRA and the LMRA is on labor-management relations. . . ." *Id.*, at 320.

ability of peaceful self-help weapons to employees at impasse in collective bargaining is a "sphere in which the federal interest is especially pervasive"[22] because the "process of free and voluntary collective bargaining is the keystone of the federal scheme"[23] and state restraints will inevitably intrude into the "substantive aspects of the bargaining process to an extent Congress has not countenanced."[24] Because the Wisconsin statute works more than a possible "tangential frustration" of federal labor policy and, instead, directly forbids the use of a federally permissible economic weapon, no balancing of the relative importance of federal and state interests is warranted here.[25] In any case, since the Wisconsin law invades the federal sphere for no cognizable state interest, *i. e.*, only to rebalance more restrictively the same special interests of employers, unions and employees in labor disputes that Congress has already accommodated,[26] its application as to parties covered by the NLRA is repugnant to Article VI, cl. 2 of the Constitution of the United States.

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[22] *Hanna Mining Co. v. District 2, Marine Engineers Beneficial Assoc.*, 382 U.S. 181, 193, n. 14 (1965).

[23] "The importance of the area which would be affected by separate systems of substantive law makes the need for a single body of federal law particularly compelling. The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace. State law which frustrates the effort of Congress to stimulate the smooth functioning of that process thus strikes at the very core of federal labor policy." *Teamsters Union Local No. 174 v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962).

[24] *Labor Board v. Insurance Agents' International Union*, 361 U.S. 477, 498 (1960).

[25] Compare *ITT Lamp Division v. Minter*, 435 F.2d 989, 992 (1st Cir., 1970) [payment of welfare benefits to strikers] and *Grinnell Corporation v. Hackett*, 475 F.2d 449, 457, 461 (1st Cir., 1973) [same, unemployment compensation after seven weeks]. But see *Hawaiian Telephone Co. v. Hawaii*, — F. Supp. —, 90 LRRM 2854 (D. Haw, 1975).

[26] This Court recognized in *Briggs-Stratton* that the concern of § 111.06(2) (h) is with nothing more than union conduct thought too "coercive" of employer collective bargaining interest. 336 U.S. at 264-265.

B. In enacting and amending the federal statute, Congress struck a balance of protection, prohibition and liassez-faire in respect to collective bargaining that must occupy the field of economic weapons permissible under a uniform national labor policy.

The holding below that states have plenary power to regulate federally permissible partial strike activity conflicts directly with this Court's decision in *Morton*[27] and is contrary to the teachings of this Court in *Garner*,[28] *Insurance Agents*[29] and their progeny.

Morton stands squarely for the principle that a state cannot outlaw a peaceful weapon of self-help which is permitted but not arguably protected by the federal statute.[30] There, union members struck a trucking firm and, in a non-coercive manner, one of the business representatives persuaded a customer to refrain from using the services of the struck firm, activity permitted by the federal statute but for which the lower court had

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[27] *Local 20, Teamsters Union v. Morton*, 377 U.S. 252 (1964).

[28] *Garner v. Teamsters, etc. Local No. 776*, 346 U.S. 485 (1953).

[29] *NLRB v. Insurance Agents' International Union*, 361 U.S. 477 (1960).

[30] Professor Lesnick, as part of his thesis that the "time has long since come to eschew entirely the traditional 'primary jurisdiction' rationale implicit in the 'protected or prohibited' aphorism" in favor of a "negative inference" rationale consistent with petitioners' position here, observes: "[T]he notion that there is no preemption if unprotected conduct is also not prohibited is simply not the law. * * * *Morton* is squarely dispositive of the point. . . ." Lesnick, "Preemption Reconsidered: The Apparent Reaffirmation of Garmon", 72 *Col. L. Rev.* 469, 472, 474 (1972). See also, Ratner, "Damage Actions and the Impact of the Morton Case", *18th Ann. NYU Conf. on Labor*, 117, 122 (1966): "*Morton* is significant also in that it finally lays to rest the notion that conduct which the . . . Act neither prohibits nor protects is necessarily outside the occupied field and therefore subject to state law."

awarded damages under state law. This Court, assuming the conduct to be neither arguably protected under § 7 nor prohibited under § 8,[31] nevertheless barred application of state law because it would upset the balance of power struck by Congress in the federal statute:

> "This weapon of self-help, permitted by federal law, formed an integral part of the petitioner's effort to achieve its bargaining goals during negotiations with the respondent. Allowing its use is a part of the balance struck by Congress between the conflicting interests of the union, the employees, the employer and the community. Electrical Workers Local 761 v. Labor Board, 366 US 667, 672. If the Ohio law of secondary boycott can be applied to proscribe the same type of conduct which Congress focused upon but did not proscribe when it enacted § 303, the inevitable result would be to frustrate the congressional determination to leave this weapon of self-help available, and to upset the balance of power between labor and management expressed in our national policy."[32]

The *Morton* premise extends to self-help weapons generally the *Garner* postulate that the Act is a comprehensive code which outlaws certain types of picketing but implicitly permits others not specifically prohibited and hence bars their restraint by the states as an obstruction of federal policy.[33]

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[31] 377 U.S. at 258.

[32] *Id.* at 259-260.

[33] "The detailed description of a procedure for restraint of specified types of picketing would seem to imply that other picketing is to be free of other methods and sources of restraint. For the policy of the [NLRA] is not to condemn all picketing but only that ascertained by its prescribed processes to fall within its prohibitions. Otherwise, it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing. For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits." *Garner v. Teamsters, etc.*, 346 U.S. at 499-500.

The court below thought the *Garner-Morton* theory of legislatively sanctioned laissez-faire was inapposite because Congress has not "taken in hand" or "focused upon" concerted refusals to work overtime as it had upon picketing and secondary pressures.[34] But suggests that the federal statute regulates only interstitially the area of permissible collective bargaining weapons, a premise that is demonstrably incorrect. The federal statute comprehensively fixes when and for what reasons an employer may replace or discharge strikers,[35] unilaterally change working conditions;[36] or lock out his employees.[37] It leaves him free to blunt the effectiveness of an anticipated strike by stockpiling inventories, readjusting contract schedules, subcontracting or transferring work from one point to another.[38] Likewise, it deals exhaustively with the time and circumstances when

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[34] *Morton* may have been an "easy case" because it involved secondary pressures, but, as Professor Cox states, its "underlying principle . . . is one of broad application" reaching *any* state-imposed "restrictions upon labor's use of economic weapons going beyond NLRA section 8(b) in terms of prohibited objects or forms of economic pressure.' That underlying principle, according to Professor Cox, "explains more than the *Morton* case. It also supplies the ultimate foundation for the rule that state laws may not be used to restrict activities protected by Section 7." He propounds the rationalizing principle as follows: "Congress struck a balance of protection, prohibition and laissez faire in respect to union organization, collective bargaining and labor disputes that would be upset if a state could also enforce statutes or rules of decision resting upon its own views concerning accommodation of the same interests." Cox, "Labor Law Preemption Revisited", 85 *Harv. L. Rev.* at 1352, 1354 (1972).

[35] *Labor Board v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1965); *Labor Board v. Fleetwood Trailer Co.*, 389 U.S. 375 (1965).

[36] *Labor Board v. Crompton Highland Mills, Inc.*, 337 U.S. 217 (1949); *Labor Board v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972).

[37] *American Ship Building Co. v. Labor Board*, 380 U.S. 300 (1965); *Labor Board v. Brown Food Store*, 380 U.S. 278 (1965).

[38] *Id.* at 283.

workers may strike;[39] the terms on which they may maximize economic pressure through internal discipline;[40] and with the extent to which partial strike activities are permitted[41] or even protected from employer reprisal.[42] In contrast with the "negative inference" deducible from such pervasive regulation of an area so central to federal concerns, Congress wrote only one provision, § 14(b), saving state power over the federally regulated subject matter.[43]

In particular, occupation of the field of partial strike activities by the federal scheme is dictated by the freedom of contract considerations that lie at the very core of the federal labor policy. In *Insurance Agents*,[44] the Labor Board found that

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[39] *Labor Board v. Lion Oil Co.*, 252 U.S. 282 (1957).

[40] *Labor Board v. Allis Chalmers Mfg. Co.*, 338 U.S. 175 (1967); *Labor Board v. Granite State Joint Board*, 409 U.S. 213 (1972); *Florida Power & Light Co. v. International Brotherhood of Electrical Workers*, 417 U.S. 790 (1974).

[41] *Labor Board v. Insurance Agents' International Union*, 361 U.S. 477 (1960).

[42] Refusals to work voluntary overtime: *Dow Chemical Co.*, 152 NLRB 1150. Concerted rejection by production workers of optional truckdriving assignments: *Memphis Moldings, Inc.*, 164 NLRB 524. Non-unit workers' refusal to perform struck work: *Cooper Thermometer Co.*, 154 NLRB 502; *General Tire & Rubber Co.*, 190 NLRB No. 44, *enf'd*, 451 F.2d 257 (1st Cir., 1971). Refusal to cross picket lines at customer premises: *Redwing Carriers, Inc.*, 137 NLRB 1545, *enf'd*, 325 F.2d 1011 (D.C. Cir. 1963); *Overnight Transportation Co.*, 154 NLRB 1271, *enf'd*, 364 F.2d 682 (D.C. Cir., 1965); *Swain and Morris Constr. Co.*, 168 NLRB 1064.

[43] Lesnick, "Preemption Reconsidered", 72 *Col. L. Rev.* at 478, 480. "[T]he state is not merely filling a gap when it outlaws what federal law fails to outlaw; it is denying one party to an economic contest a weapon that Congress meant him to have available. * * * *Lockridge* in effect affirms this view, which is plainly consonant with the realities of the legislative process as it has dealt with the economic weapons available to labor and management." *Id.* at 478-479.

[44] *Insurance Agents' International Union v. Labor Board*, 361 U.S. 477 (1960).

union-induced refusals to work normal hours and other concerted work interference in aid of the union's bargaining position violated § 8(b)(3) of the Act because such tactics obstructed the collective bargaining process by affording employees unfair economic advantage. This Court assumed, *arguendo*, that § 7 does not protect such partial strike tactics[45] but, reversing the Board on the point, held them permitted by the federal statute.

The premises underlying *Insurance Agents* necessarily defeat the state power exercised below. This Court reasoned that the availability of economic pressure devices is part and parcel of the process of collective bargaining to which the statute was committed and, in fact, that the very substance of the bargain is likely to turn upon the selection of economic weapons which one party can use to induce the other to come to terms.[46] Congress had not authorized the Board to "act at large in equalizing disparities of bargaining power"[47] in the name of "some new distinction of justifiable and unjustifiable, proper and abusive economic weapons"[48] or "to sit in judgment upon every economic weapon the parties to a labor contract employ" because "this amounts to the Board's entrance into the substantive aspects of the bargaining process to an extent Congress has not countenanced."[49]

If such conduct cannot be barred by the agency given "primary responsibility to weigh the interest of employees in concerted activities against that of the employer in operating his

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[45] *Id.*, at 492.

[46] *Id.*, at 489.

[47] *Id.*, at 490.

[48] *Id.*, at 497.

[49] *Id.*, at 498. Accord: *American Ship Building Co. v. Labor Board*, 380 U.S. 300, 317 (1965) [post-impasse bargaining lockout] and *Labor Board v. Brown*, 380 U.S. 278, 292 (1965) [use of temporary replacements in multi-employer lockout].

business,"[30] it follows, a fortiori, that *state* courts and agencies are barred from upsetting the federal balance by interposing local standards as to allowable bargaining weapons.[31] If the expert federal agency cannot bar an employer from locking out its employees because the "proper balance to be struck between competing interests" is a "major policy decision properly made [only] by Congress,"[32] surely the federal statute must implicitly limit each of the 50 states from acting as arbiters of the sort of economic weapons the parties can use. The nexus between terms of settlement and relative economic strength of the parties is far too close to allow any arm of government but the Congress of the United States to write all or any part of the contract for the parties, directly or by limiting the "economic power realities" that set the "balance of bargaining advantage."[33] Since Congress itself "has been rather specific when it has come to outlaw particular economic weapons on the part of unions," the

[30] *Id.*, at 294-295 (Mr. Justice White, dissenting).

[31] "[I]t is strongly felt that concerted activity which serves to interfere with the employer's operations, without removing the participants from the employer's payroll is 'indefensible' . . . [H]owever, it seems a sufficient response that the employer is left free, as a matter of federal law, to discharge the culprits. No state intervention would appear to be called for * * * From [*Insurance Agents*] it would seem to follow a fortiori that state courts and agencies may not interject their standards of 'unjustifiable' or 'abusive' economic weapons into the context of a collective bargaining dispute." Michelman, "State Power to Govern Concerted Employee Activities", 74 *Harv. L. Rev.* 641, 668-669 (1961).

[32] *Labor Board v. Brown*, 380 U.S. at 292.

[33] *Labor Board v. Burns International Security Services*, 406 U.S. 272, 288 (1972). *H. K. Porter Co. v. Labor Board*, 397 U.S. 99, 107-108. *Labor Board v. American National Insurance Co.*, 343 U.S. 395, 404 (1952). NLRA § 8(d). "Since freedom to reject the terms proposed by the other party implies freedom to resort to economic pressures, the [federally preemptive legal] framework again necessarily includes a law of lockouts, strikes and picketing. To restrict either the objectives for which economic pressure can be applied or the forms of pressure which are permissible tips the scale toward management or union." Cox, "Labor Law Preemption Revisited", 85 *Harv. L. Rev.* at 1353.

"admonition against regulation of the choice of economic weapons that may be used as part of collective bargaining absent a particularized statutory mandate" must run to the states as well as the federal agency if the federal legislative will is to be effectuated.[34] In sum, converging considerations of free collective bargaining, of the uniformity implicit in the passage of a national labor law and of fidelity to the legislative process that has yielded the federal statute also compel the conclusion that Congress has enacted a comprehensive code that must be taken to have occupied the field and closed it to state regulation.

C. Since Congress rejected proposals to outlaw concerted interference with an employer's operations short of a full-fledged strike, state law may not in any event frustrate the federal determination to leave available this kind of self help weapon.

Were the fact of legislative focus not sufficiently evident from the considerations just set forth, the preemptive federal purpose with respect to the kind of conduct in question clearly emerges in the legislative history of the 1947 amendments. The bill that passed the House, H.R. 3020, defined certain "unlawful concerted activities" and made them subject to judicial enforcement by way of federal injunction and damage actions and made workers who engaged in them subject to loss of statutory rights. § 12(a)(3)(A) of the bill provided as follows:

> "Sec. 12(a) The following activities, when affecting commerce, shall be unlawful concerted activities:
>
> * * * * * * * *
>
> (3) Calling, authorizing, engaging in, or assisting—(A) * * * any sit-down strike or other concerted interference

[34] *Florida Power & Light Co. v. Int. Bhd. of Electrical Workers*, 417 U.S. 790, 805, n. 16 (1974). *Labor Board v. Drivers Local Union No. 639*, 362 U.S. 274, 282-283 (1960).

with an employer's operations conducted by remaining on the employer's premises."[55]

The House Report explained that the committee had simply "written into the act" the rules that the courts had followed in denying protection under § 7 to certain types of concerted activity, claiming that the Board only "professes" to follow them, "sometimes reluctantly" doing so, but "often reinstat[ing] with back pay employees whose concerted activities are unlawful."[56] Given the reach of the language—closely resembling the state statute applied here—together with a declared purpose to outlaw those concerted activities fairly within its reach that reviewing courts[57] and at times the Board[58] had held unprotected, no feats of interpretative imagination are necessary to determine that concerted refusals to work overtime would have been encompassed as an unlawful concerted activity. Indeed, this Court has thought it "quite likely" that partial strike conduct would have been outlawed.[59]

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[55] H.R. 3020, 80th Cong., 1st Sess., § 12, reprinted at *I, Legislative History of the Labor Management Relations Act*, 1947, p. 205. See, also § 12 (b), (c) and (d) and § 7(a); *id.*, pp. 206-207, 176.

[56] H. Rep. No. 245 on H.R. 3020, 80th Cong., 1st Sess., pp. 27-28; reprinted at *I Legisl. Hist. of LMRA*, pp. 318-319.

[57] *C. G. Conn, Ltd. v. Labor Board*, 108 F.2d 390, 397 (7th Cir., 1939) [reasoning that a worker cannot "be on a strike and at work simultaneously" in holding unprotected a concerted refusal to work mandatory overtime]. *Home Beneficial Life Ins. Co. v. Labor Board*, 159 F.2d 280 (4th Cir., 1947).

[58] Compare *Harnischfeger Corp.*, 9 NLRB 676, 685-686 [refusal to work overtime protected because a full fledged strike would have caused employer "much more serious difficulty" yet be protected] and *Cudahy Packing Co.*, 29 NLRB 837, 867-868, with *Mt. Clemens Pottery Co.*, 46 NLRB 714-715-716 [suspension for concerted refusals to work overtime held lawful because employees had insubordinately refused to work on terms prescribed by employer]. Because the Board had limited the employer to suspensions until the employees agreed to work the mandatory overtime and prohibited outright discharge, the Sixth Circuit modified the order, 147 F.2d 262. (6th Cir. 1945)

[59] *Labor Board v. Insurance Agents' Int. Union*, 361 U.S. at 499, n. 31.

But § 12 was rejected in the Conference Committee with the following explanation;

> "Under existing principles of law developed by the courts and recently applied by the Board, employees who engage in violence, mass picketing, unfair labor practices, contract violations, or other improper conduct, or who force the employer to violate the law, do not have any immunity under the act and are subject to discharge without right of reinstatement. The right of the employer to discharge an employee for any such reason is protected in specific terms in section 10(c)."[60]

Congress enacted the statute without § 12, presumably in agreement that the federal balance warranted only employer self-help to counter peaceful partial strike activity.

This history demonstrates at once the fact of legislative focus and its telling significance for preemption purposes. Because H.R. 3020 also provided for majority strike votes but the Act as passed did not, and the legislative history showed no intent to leave the states free to adopt it, this Court unanimously struck down Michigan's statute requiring secret ballot votes before striking as applied to enterprises subject to the federal statute.[61] Similarly, because Congress had rejected proposals to substitute compulsory arbitration for the right of local public utility employees to strike, this Court held that enforcement of Wisconsin's compulsory arbitration statutes against local utility employees covered by the Act "conflict[ed] with the exercise of federally protected rights."[62] In light of

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[60] H. Conf. Rep. No. 510 on H. R. 3020, 80th Cong., 1st Sess. p. 59, reprinted at *I Legisl. Hist. of LMRA*, p. 563.

[61] *International Union, United Automobile, etc. Workers v. O'Brien*, 339 U.S. 454, 458 (1950).

[62] *Amalgamated Ass'n of Street, etc. Employees v. Wisconsin Employment Relations Board*, 340 U.S. 383, 396 (1951).

these holdings, it seems myopic to suggest, as did the court below, that Congress can "focus upon" activity only by giving it "very comprehensive statutory treatment" (P. A-14). Instead, since the legislative history evidences Congressional rejection of proposals to outlaw concerted action closely resembling the state statute applied here on the judgment that the matter should be left to employer self-help, Wisconsin's contrary determination must yield.

This history together with the gloss put on it by this Court demonstrates also the precision and sensitivity of the accommodation of competing labor-management interests delineated in federal labor policy. The proposition that state power to restrain peaceful worker pressures short of full-fledged strike ought to run concurrently with the employer's recourse to self-help is just as unreasoned and simplistic as its necessary corollary—that state power should exist to proscribe employer bargaining tactics short of the lockout. Of course, both proposition and corollary are non-sequiturs because:

> "There is little logic in assuming that because Congress was willing to allow employers to use self-help against union tactics, if they are willing to face the economic consequences of its use, it also impliedly declared these tactics unlawful . . ."[63]

One important "economic consequence" that an employer must weigh before disciplining or replacing either the leaders or participants is the *protected* right of co-workers to go on strike for their reinstatement and thereby deprive the employer of his remaining production while running the risk of permanent replacement themselves.[64] In short, because Wisconsin allowed

[63] *Labor Board v. Insurance Agents*, 361 U.S. at 495.

[64] *John S. Swift Company, Inc.*, 124 NLRB 394, *enf'd on this point*, 277 F.2d 641 (7th Cir., 1960). In *Swift*, the employer discharged a number of employees who, in support of certain bargaining demands, had concertedly refused to work a mandatory assignment of overtime hours. Other employees then observed the picket lines established by the discharged workers and were, in turn, discharged. The Board held, and the Court of Appeals agreed, that the latter discharges were unlawful. "[E]mployees who go on strike to protect a lawful discharge enjoy statutory protection as economic strikers." 277 F.2d at 646.

K & T to avoid facing the economic consequences of self-help by outlawing its workers' peaceful bargaining pressures, the state has impermissibly infringed on the area of labor combat designed to be free.

D. Since this Court's divided, discredited and mischievious holding in Briggs-Stratton conflicts with the clear pattern of later preemption decisions, it should be overruled or limited to its facts.

Because the decision below materializes the *Briggs-Stratton* spectre that peaceful collective bargaining weapons may come within some excluded middle of federal labor policy and, though not prohibited by § 8 of the NLRA, be subject to state prohibition, it is time for this Court to lay the ghost. From what has already been said, it seems obvious that later holdings here have drained that early decision, voted by a bare majority of the Court, of its vitality. It has had no progeny in subseqeunt holdings. Its "approach" has been specifically repudiated by this Court on no less than three occasions.[65] Its substantive holding has been questioned several times, implicitly[66] and then

[65] See citations at p. 9, n. 11, *supra*.

[66] "Or, the Board may decide that an activity is neither protected nor prohibited, and thereby *raise the question* whether such activity may be regulated by the States." *San Diego Building Trades v. Garmon*, 359 U.S. at 245 (Emphasis added). Cf. "[s]urely that suggestion is foreclosed by [*Briggs-Stratton*]", *id.* at 253 (Mr. Justice Harlan, concurring).

expressly.[67] Again, although this Court's labor preemption opinions have rarely issued without concurrences or dissents in recent years, it seems significant that ***Briggs-Stratton*** has not been cited approvingly in any Court or separate opinions since 1959.[68] Not surprisingly, state courts have divided as to whether its holding remains authoritative.[69] And leading scholars have observed that the force of the *Briggs-Stratton* preemption holding was, in steady progression, undermined by *Garner*,[70]

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[67] "We may agree *arguendo* . . . that this Court's decision in the *Briggs-Stratton* case . . . established that the employee conduct here was not a protected concerted activity". *Labor Board v. Insurance Agents*, 361 U.S. at 492. "[*R*]*egardless of the status today* of other *substantive* rulings in the *Briggs-Stratton* case * * * [T]o view *Briggs-Stratton* as controlling on the § 8 issue would be to compound the defects of a *now discarded approach* to preemption; it would amount to saying that the Board [is] foreclosed . . . by a *decision rendered long ago* * * * *Perhaps* this element of the *Briggs-Stratton* decision [that '§ 13, unlike § 7, was not an inhibition on state power'] *has become open also.*" *Id.* at 493, n. 23 (emphasis added).

[68] See n. 66, *supra*, p. 23. By way of contrast, the vitality of *Garner-Morton* preemption approach is demonstrated by their citation in most of the recent decisions of this Court on the subject, whether or not secondary pressures were discussed. See *Beasley v. Food Fair Stores*, 416 U.S. 653, 662 (1974); *Labor Board v. Nash-Finch Co.*, 404 U.S. at 144; and *Connell Constr. Co. v. Plumbers, etc. Local No. 100*, — U.S. at —, 44 L.Ed.2d at 434.

[69] Compare *Holland Motor Express v. Michigan Employment Security Commission*, 42 Mich. App. 19, 201 N.W. 2d 308, 319 (1972) [since lockout merely permitted and not protected by NLRA, no preemption of payment of unemployment benefits on authority of *Briggs-Stratton*] and *Simpkins v. Southwestern Idaho Painters District Council No. 57*, 20 Idaho 1, 505 P.2d 313, n. 12 (1973) [*Briggs-Stratton*, "an earlier decision apparently inconsistent with *Morton*"].

[70] In 1958, Professor Paul R. Hays wrote of *Briggs-Stratton*: "But under the logic of *Garner*, it too, would be preempted, and I do not believe that any attempt to extend *Briggs-Stratton* beyond its exact facts would be successful. And this warning would apply even to conduct which has been held by the Board, much more clearly than had the conduct involved in *Briggs-Stratton*, to be unprotected, though not prohibited." Hays, "State Courts and Federal Preemption", 23 *Mo. L. Rev.* 373, 376. In early 1959, Professor Meltzer wrote that Garner is "plainly incompatible with the result and the approach in *Briggs-Stratton*. . . . Accordingly, . . . [Briggs-Stratton] appears to be a doubtful basis for state competence over unprohibited and unprotected conduct." Meltzer, "The Supreme Court, Congress and State Jurisdiction Over Labor Relations: I", 59 *Col. L. Rev.* 1, 17 (1959).

rejected in *Garmon*,[71] overruled inferentially by *Insurance Agents*[72] and felled in *Morton*.[73]

Scholars have also written that the premises underlying its analysis of "partial strike" activities and the protection of § 7 cannot be squared either with reason, with the realities of industrial relations or with other authorities.[74] For example, the claim that federal legislation allowing discharge for unprotected conduct would not preclude the lesser sanction of re-

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[71] After *Garmon*, Professor Harry Wellington questioned whether *Briggs-Stratton* was "supportable" where the work stoppages were not "associat[ed] with potential violence . . . this weightiest of state interests" and said "the answer is no (and I assume that without this association intermittent work stoppages are still, as a matter of federal law, outside the protection of Section 7." For one thing, he reasoned, to allow the state to "add its sanction to the employers could . . . upset the delicate bargaining balance established by federal law." For another, "no tribunal except the NLRB is to be trusted with expounding in the first instance the meaning of Section 7." Wellington, "Labor and the Federal System", 26 *U. of Chi. L. Rev.* 542, 550, 552.

[72] "[I]t would seem to follow a fortiori that state courts and agencies may not interject their standards of 'unjustifiable' or 'abusive' economic weapons into the context of a collective bargaining dispute". Michelman, "State Power to Govern Concerted Employee Activities", 74 *Harv. L. Rev.* 641, 669.

[73] Ratner, "New Developments in Federal State Jurisdiction", *15th Ann. NYU Conf. on Labor* 47, 54-55: Cox, *supra*, 85 *Harv. L. Rev.* at 1348, 1352; Lesnick, *supra*, 72 *Col. L. Rev.* at 474.

[74] See, e.g., Cox, "The Right to Engage in Concerted Activities", 26 *Ind. L. J.* 319, 337-340 (1951); Getman, "The Protection of Economic Pressure By Section 7", 115 *U. of Penn. L. Rev.* 1195, 1232-1240 (1967); and Schatzki, "Some Observations and Suggestions Concerning a Misnomer—'Protected' Concerted Activities", 47 *Tex. L. Rev.* 378, 379-382 (1969).

course to state legal restraints conflicts with the probable realities of relative bargaining power in the circumstances.[75] Eleven years later this Court recognized that there was "little logic" in such reasoning and expressly repudiated it.[76] The notion that the federal agency had no power to deal with partial strike activity in any manner and hence it must be "governable by the states or it is entirely ungoverned" became an obvious anachronism after the Labor Board discerned such authority in § 8(b)(3).[77] One of its most important underpinnings, that the employer seemed to lack "any kind of self-help to cope with these coercive tactics", has come completely open as federal labor policy has evolved since 1949. It is "no longer true, if it ever were true, that an employer is helpless in the face of such bargaining tactics."[78] Finally, the aphorism that it is somehow "indefensible" for employees to be on strike and at work simultaneously has either been bypassed by the evolution of

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[75] "In fact, most employers facing a union with the strength and discipline to call a series of 'quickie' strikes would lack the economic power to discharge union members, leaving legal redress the more efficient sanction." Cox, "Labor Law Preemption Revisited", 85 *Harv. L. Rev.* at 1347.

[76] *Labor Board v. Insurance Agents,* 361 U.S. at 495.

[77] Lesnick, "Preemption Reconsidered", 72 *Col. L. Rev.* at 478, n. 48.

[78] "Not only may he replace the employees involved, but he is free to lock them out or subcontract the work they have been doing", matters that were "not clear" when *Briggs-Stratton* was decided. "A bargaining lockout, in particular, would seem to be an appropriate defensive measure. . . . So long as the employer may, in effect, choose to turn the conduct into a total strike, there is no reason why it should be held unprotected because it is different than a total strike * * * [T]he Court should . . . overrule the holding in the *Briggs & Stratton* case." Getman, "Protection of Economic Pressure", 115 *U. of Penn. L. Rev.* at 1236. Professor Schatzki suggests an additional possibility which he terms the "partial lockout"; *i.e.* a reduction in wages or a decrease in some other beneficial working conditions. Schatzki, "Misnomers", 48 *Tex. L. Rev.* at 382.

employer defenses or, as sheer rhetoric, begs the relevant questions.[79]

In any event, if not to be overruled, *Briggs-Stratton* is plainly distinguishable on its facts from the conduct in question here. There, the work stoppages were intermittent, irregular and unannounced; conducted for unstated purposes during normal working hours; and they crippled the employer from meeting production or delivery schedules. Here, K & T employees worked their regular work day performing their normal duties; their rejection of overtime was not intermittent and quite predictable; and K & T could and did plan production accordingly. Here, the employer was never in the dark as to the employees' purpose. The concerted action was, at first, a measured protest of the announced unilateral increases in work schedules and corresponding reductions in overtime rates. Later, the pressure continued to resolve the issues still at impasse in the drawn-out negotiations. Finally, in *Briggs-Stratton*, this Court could compare the 26 intermittent work stoppages over a four month period to worker takeover of the plant, a sequence of "sit-down strikes". Here, in contrast, the employees were merely exercising their customary right to reject overtime and leave at shift's end, conduct so unobjectionable that K & T conceded it would be "hard-pressed" even to discipline anyone for his participation (A. 38-39).

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[79] Compare *Edir, Inc.*, 159 NLRB 686 [picketing of employer's restaurant during off-duty hours held protected] and cases cited, *supra,* at p. 16, n. 42. No substantial distinction can be drawn between the "partial strike" conduct in these illustrations of protected activity and concerted refusals to work mandatory overtime, either in terms of disloyalty, insubordination, pay only for work performed, the-less-than-absolute worker interests that may give rise to it, or impact on the employer's business.

II. Since Concerted Exercise of a Right to Reject Overtime Is Protected From Employer Interference by § 7 of the NLRA, It May Not Be Prohibited by the State.

So far, our argument has proceeded on the premise that the conduct in question is merely permitted by the federal statute. We now show that § 7 of the Act protects concerted exercise of a right to reject overtime and hence, under classic preemption doctrine, no state may restrain the exercise of a right secured by the federal statute.[80]

In *Dow Chemical Co.*, 152 NLRB 1150, weekend overtime work was voluntary *i.e.*, employees were asked beforehand whether they wanted weekend work and were free to decline it. After the company announced that such overtime assignments would become mandatory several weeks later, a group of employees resolved to and did in fact engage in concerted refusals to work overtime shifts before the change was to take effect for the purpose of exerting pressure on the company to forego the change. The Board concluded that the discharge of an employee for having led and participated in the concerted refusals to work violated § 8(a)(1). Distinguishing prior cases where employees had in effect been insubordinate in their collective refusals to work required overtime assignments, it held participation in and leadership of these concerted refusals to be protected by § 7 because the acceptance of this overtime work was voluntary.[81]

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[80] See, e.g., *Hill v. Florida*, 325 U.S. 538 (1945). *International Union, United Automobile, etc. Workers v. O'Brien*, 339 U.S. 454 (1950).

[81] Since overtime work was optional, "the employer had already agreed to permit employees to decide for themselves whether they wished to work weekends * * * [and thus in concertedly rejecting the work the employees did not seek] to impose on their employer their own condition of employment." 152 NLRB at 1152.

Notwithstanding the Board's evident distinction between conduct amounting to insubordination and group exercise of a right to reject, the court below would build a fortress on the procedural fortuity that Dow employees had concertedly refused to "volunteer" for the scheduled work whereas K & T employees had concertedly exercised their options to reject it (P. A-12). Aside from the patent insubstantiality of the purported distinction in terms of any values secured by the Act, the court completely ignored a Board decision rejecting just such a claim. *Memphis Moldings, Inc.*, 164 NLRB 524.[82]

Finally, the court below incorrectly believed the Board's divided decision in *Prince Lithograph*[83] to hold that union-induced, concerted refusals to work scheduled or requested overtime are unprotected even if that overtime is voluntary, chiefly because, in a confused dictum, the administrative law judge had at first analogized a concerted refusal to work voluntary overtime for a *secondary* object[84] with the *primary* conduct he now faced.[85] The decision below ignores the fact that the administrative judge went on to hold that the Prince employees

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[82] Three plant employees also drove truck for the employer but had the option of rejecting a particular truckdriving assignment to continue working in the plant. When all the drivers exercised their option to *reject* such assignments in order to pressure the employer to negotiate a higher mileage rate with their union for such work, they were dismissed. Applying *Dow*, the Board found that the concerted refusals were protected by § 7. "As Respondent made the acceptance of such an assignment optional or voluntary, the drivers were not seeking to impose on their employer their own conditions of employment to perform such work." 164 NLRB at 527.

[83] *Prince Lithograph Co., Inc.*, 205 NLRB 110.

[84] *Id.*, at 115.

[85] Significantly, perhaps, the same administrative judge who decided *Prince Lithograph* had been *reversed* by the Board when he recommended dismissal of the complaint in the earlier case. That the strike activity was otherwise protected, the Board held, was no defense to a secondary boycott complaint. *Iowa Beef Packers, Inc.*, 188 NLRB 5, 6.

who had concertedly refused to work voluntary overtime did *not* "engage in unprotected activity" but that Prince nevertheless

> "had the right to replace [the employee] as it had the right to replace any other striker for refusing to work."[86]

In other words, not even the administrative judge's decision in *Prince* stands for the proposition relied upon below.

Most assuredly, the Board in *Prince* approved only the administrative judge's holding. It reasoned:

> "[W]e think the more realistic view to be that Respondent was *merely replacing* an employee who engaged, at the instance of the Union, in a partial strike by participating in a concerted refusal to work overtime. Such activity, as the Administrative Law Judge below found, gives rise to a *counter-vailing right* of the Employer to utilize replacements in order that necessary work may be performed."[87]

This holding, of course, *presupposes* that the conduct was protected, since a "countervailing right . . . to utilize replacements" has long been an employer prerogative when faced with uncontrovertibly protected activity such as a full fledged strike or a refusal to cross picket lines.[88]

In short, since the activity here seems squarely within the protection of § 7 as interpreted by the Board, the exertion of state power to forbid it must be struck down as in conflict with the Constitution of the United States.

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[86] *Prince Lithograph Co., Inc.*, 205 NLRB at 115.

[87] *Id.*, at 110, n. 2 (emphasis added).

[88] *Labor Board v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345-346 (1938); *Teamsters Local 79 v. Labor Board*, 325 F. 2d 1011 (D.C. Cir., 1963).

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Wisconsin should be reversed.

Respectfully submitted

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APPENDIX

APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Article VI

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

National Labor Relations Act, as Amended (61 Stat. 316, 29 U.S.C. § 141, et seq.)

Section 2. "When used in this subchapter

* * * * * * *

(9) The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee."

* * * * * * *

Section 7.

"Employees shall have the right * * * to engage in * * * concerted activities for the purpose of collective bargaining or other mutual aid or protection."

Section 8(a).

"It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exerise of the rights guaranteed in Section 7."

Section 8(b).

"It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce * * *."

Section 10.

"(a) The Board is empowered * * * to prevent any person from engaging in any unfair labor practice * * * affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by * * * law."

* * * * * * * *

Section 13.

"Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

Section 501.

"When used in this act—

* * * * * * * *

(2) The term 'strike' includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective bargaining agreement) and any concerted slow-down or other concerted interruption of operations by employees."

Wisconsin Statutes

Sec. 111.06.

(2) "It shall be an unfair labor practice for an employee individually or in concert with others:

* * * * * * * *

(h) To take unauthorized possession of the property of the employer or to engage in any concerted effort to interfere with production except by leaving the premises in an orderly manner for the purpose of going on strike."